

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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TRANSCRIPT OF RECORD.

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1913.

No. 2539.

14

AULICK PALMER, APPELLANT,

vs.

JOHN F. COSTELLO.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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In the Court of Appeals of the District of Columbia.

No. 2539.

AULICK PALMER, Appellant,

vs.

JOHN F. COSTELLO.

a Supreme Court of the District of Columbia.

At Law. No. 52252.

JOHN F. COSTELLO, Plaintiff,

vs.

AULICK PALMER, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:

1

Declaration.

Filed December 28, 1909.

In the Supreme Court of the District of Columbia.

Law. No. 52252.

JOHN F. COSTELLO, Plaintiff,

vs.

AULICK PALMER, Defendant.

The plaintiff, John F. Costello, sues the defendant, Aulick Palmer, for that in the latter part of January or early part of February, 1907, and at the time of the grievances hereinafter mentioned, and both before and since, the said plaintiff was the owner of the steam-yacht "India" while the said defendant was the United States Marshal in and for the District of Columbia, and as such was a special officer of the Supreme Court of the District of Columbia, and had charge of all process which might issue for and on behalf of said

Court; that on or about November 13, 1906, a certain maritime libel suit was instituted in the Supreme Court of the District of Columbia, sitting as a District Court of the United States in and for the District of Columbia, by W. S. Moore's Sons, against the steamyacht "India" its tackle, apparel and furniture, and John F. Costello (being No. 700), whereupon there issued a warrant for the arrest and detention of the said steamyacht "India", and the said defendant as United States Marshal as aforesaid, by and through one of his deputies, servants or agents, found the said steamyacht "India" at

2 anchor across from Thirteenth Street, Southwest, and thereupon arrested, seized, detained, and took charge of her, said steamyacht "India", by tacking up on the side of said boat a notice to the effect that said steamyacht "India" had been libelled, was arrested, and would be detained until the further order of the Court; that it then and there became and was the duty of the said defendant, as said special officer of the Court, to keep said steamyacht "India" reasonably safe, so that it might be reasonably protected from harm and damage during such time as it might remain in the care and custody of the said defendant, and pending its ultimate disposal in the aforementioned libel suit; but notwithstanding his said duty in the premises, said defendant, being and remaining wholly unmindful thereof, became and was negligent in that he failed to put a man in charge of said steamyacht "India" to watch over her safety, or to haul said steamyacht "India" out on the land, and thus keep her reasonably safe from harm, and failed to guard or protect the machinery, pipes and equipment of said steamyacht "India" but wholly neglected said steamyacht "India", and left her unwatched, unguarded, unprotected and uncared for, and exposed to all the rigor of the severe winter weather which occurred along in December of 1906, and January and the early part of February of 1907; whereby, and by reason of which said negligence the said steamyacht "India" was allowed to sink to the bottom of the river, where she has since been suffered to remain by and through the further negligence of the defendant, the said United States Marshal; and by reason of the premises, and further the fact that said Libel Suit (#700) has been discontinued and ended, and demand

3 has since been made by the owner, plaintiff herein, upon the defendant, the said United States Marshal, to restore said steamyacht "India" into the possession of the said owner, plaintiff herein, as aforesaid, in like good order and condition as when arrested and taken into custody by the said defendant, said steamyacht "India" has not been restored to the possession of her owner, plaintiff herein, but has ever since her said sinking been allowed to remain at the bottom of the river until she has become and is a total wreck and complete loss to the said plaintiff, owner as aforesaid of the said steamyacht "India", without fault or negligence on his part, by reason of which negligence, the said plaintiff has been damaged in the sum of, to wit, \$2,000. which amount he claims of the said defendant, besides costs.

LEONARD J. MATHER,
E. N. HOPEWELL,

Attorneys for Plaintiff.

Pleas.

Filed December 19, 1910.

* * * * *

1. Comes now the defendant, Aulick Palmer, by his attorneys, and says that he is not guilty of the said supposed grievances in the declaration herein laid to his charge, or any or either of them, or any part thereof, in the manner and form as the plaintiff hath complained against him.

4 2. And for a further plea to the said declaration the said defendant says that the supposed cause of action in the said declaration mentioned did not accrue at any time within three years next before the commencement of this action.

NATHL. WILSON,
CLARENCE R. WILSON,
Attorneys for Defendant.

Joinder of Issue.

Filed December 21, 1910.

* * * * *

The plaintiff joins issue on each and every of the Pleas of the defendant heretofore filed herein.

LEONARD J. MATHER,
E. N. HOPEWELL,
Attorneys for Plaintiff.

Memorandum.

June 3, 1912.—Verdict for Plaintiff for \$500.00 and interest from November 22, 1909.

5

Motion for New Trial.

Filed June 6, 1912.

* * * * *

Now comes the defendant in the above entitled cause and moves the Court to vacate and set aside the verdict heretofore rendered in said cause, and to grant a new trial; and for grounds of this motion says:

- (1) The said verdict is contrary to the evidence;
- (2) The said verdict is contrary to the weight of the evidence;
- (3) The said verdict is contrary to law;
- (4) The Court erred in excluding evidence offered by the defendant at the trial of this cause;

(5) The Court erred in granting the prayers for instructions offered by the plaintiff;

(6) The Court erred in refusing the prayers for instructions offered by the defendant;

(7) The Court erred in its instructions to the jury.

CLARENCE R. WILSON,
PAUL E. LESH,
Attorneys for Defendant.

To Leonard J. Mather, Esquire, Attorney for the Plaintiff:

Please take notice that the above motion will be for hearing on Friday, June 14, 1912.

CLARENCE R. WILSON,
PAUL E. LESH,
Attorneys for Defendant.

6 Service of the above motion acknowledged this — day of June, 1912.

Attorney for Plaintiff.

Supreme Court of the District of Columbia.

SATURDAY, December 7th, 1912.

Session resumed pursuant to adjournment, Hon. Daniel Thew Wright, Justice, presiding.

* * * * *

Before Justice Gould.

Upon consideration of the motion for a new trial filed herein and heretofore submitted it is ordered that said motion be, and the same is hereby, overruled and judgment on verdict is ordered. Wherefore, it is considered that the plaintiff herein recover of defendant, the sum of Five Hundred Dollars (\$500.00) with interest from November 22nd, 1909, and costs of suit to be taxed by the Clerk and have execution thereof.

From the foregoing the defendant, by his attorney of record, in open Court notes an appeal to the Court of Appeals, whereupon the penalty of a bond to operate as a supersedeas is hereby fixed in the sum of Seven Hundred Dollars.

Memoranda.

December 10, 1912.—Appeal bond approved and filed.

7 January 17, 1913.—Time to settle exceptions extended to February 1, 1913.

January 31, 1913.—Bill of Exceptions submitted.

January 27, 1913.—Time to file record extended to March 1, 1913.

February 28, 1913.—Time to file record extended to March 15, 1913.

March 12, 1913.—Time to file record extended to April 1, 1913.

Supreme Court of the District of Columbia.

MONDAY, *March* 10, 1913.

Session resumed pursuant to adjournment, Hon. Daniel Thew Wright, Justice presiding.

* * * * *

Before Justice Gould.

The Court having this day signed the Bill of Exceptions taken at the trial of this cause and heretofore submitted, now orders the same of record nunc pro tunc.

8

Bill of Exceptions.

Filed March 10, 1913.

* * * * *

Be it remembered, that the above entitled cause came on for trial before Mr. Justice Gould and a jury on the 24th day of May, 1912. Whereupon the plaintiff, in order to maintain the issues on his part joined, offered testimony tending to prove that on the thirteenth day of November, 1906, he was the owner of the steam-yacht "India" and that on said day said vessel was moored in the Potomac River in deep water across the channel from Reagan's boathouse at the foot of 13th street; that said boat was then in good condition, was reasonably worth \$1,000. to \$1200., and during the open fall weather was in a safe place; that while the boat was lying off Reagan's at the place mentioned, plaintiff had engaged one of Reagan's men to look after her, who, being regularly employed at the water front near the boat, did not stay aboard her, but visited her every day while so employed, which was up to the time the boat was libeled; that on the thirteenth day of November, said steamyacht "India" was arrested by James Springman, Deputy United States Marshal, acting for and on behalf of the defendant, Aulick Palmer, United States Marshal in and for the District of Columbia, in proceedings instituted in the Supreme Court of the District of Columbia, holding District Court, entitled Thomas W. Moore and Charles W. Moore, trading and doing business as W. S. Moores' Sons, libelants, against the steamyacht "India", her tackle, apparel and furniture, and John F. Costello, respondents, Number 700 on the District Docket of the said court; that the object of the said suit was to enforce an alleged lien against the said boat to the extent of \$79.67, the sum alleged to be due and payable to the libelants for and in respect of certain repairs made to the said boat by the libelants in said cause; that as appeared by the return of the Marshal in said cause, the vessel was arrested and in custody of the defendant on said 13th day of November, 1906, and the evidence showed that the said defendant kept her in his care and custody up to the latter part of January, when she sunk

9

by reason of the freezing and bursting of one of her pipes; that in the months of December, 1906, and January and the early part of February 1907, very cold weather set in and there was from time to time during these months much ice in the river where the said boat was lying; that a reasonable and prudent man would during said period have drawn the said boat out of the water, as all the other small boats had been hauled out, or kept a watchman aboard her, or would have emptied and closed up the pipes leading from said steam-yacht into the water, or properly protected them by wrapping and packing them in order to prevent their freezing and bursting; that during the whole of said period the defendant Aulick Palmer did not haul the said boat out of the water or place a watchman aboard her, or empty or stop up her pipes, or seek to wrap, pack or protect them or take any other steps looking to the care and custody of the said boat, but left her lying at anchor in said deep water

10 throughout said freezing weather entirely unprotected and uncared for; that on a day in the last part of January or early part of February, 1907, at a time when the ice prevented anyone from getting to her, the boat was seen to be settling and sinking and then went to the bottom of the river where the Marshal allowed her to remain without any attempt on his part to raise her, although she could have been raised for \$150., and as a consequence thereof she finally became a total loss.

On cross-examination of the plaintiff he testified that he learned that his boat had been arrested and was in the custody of the Marshal on the 14th or 15th day of November, 1906; that between the time of the libeling of his said boat and her sinking plaintiff had only been to the boathouse about three times; that from the time of the libeling up to the time the boat sunk he knew she was lying in the same place in which he had left her, and that if the river froze she might sink, although he knew likewise that the Marshal had the boat in his care and custody, and that he had no business to tell him so, as he, said plaintiff, thought it would appeal to the Marshal to look after his own business and if he, said plaintiff, meddled with what he considered he had nothing to do with, he knew he was likely to get into trouble; that up to the time he was last down to the boat-house—sometime in the Christmas week—plaintiff knew that the Marshal had not hauled said boat out, and had not any watchman aboard her; that he never during the said period made complaint to the defendant of his failure to haul the said boat out of the water or place a watchman aboard her, and never requested the Marshal to do anything to preserve the said boat from

11 injury or destruction as he, said plaintiff, did not know the boat was going to sink, and had not thought anything about it, and did not consider that he had anything to do with the boat or looking after her after the Marshal had arrested and taken her from him, said plaintiff, into his own custody for safe keeping; that he knew that he could have given bond and taken the boat in his own possession and that he did not give bond because it would have been difficult and expensive for him to have furnished such a

bond, and he did not consider he could do anything with the boat after the Marshal had taken possession of her.

That on the 13th day of December, 1906, plaintiff filed a cross-libel in the libel suit against him and his boat "India" claiming the sum of \$600. of and from the libelants, W. S. Moore's Sons of Alexandria Virginia, as damages for and in respect to loss of trade and profit suffered by him by reason of the workmanship upon said boat in the improper emplacement of a certain keel condenser; that at the time he filed said cross-libel said plaintiff knew that the said boat was in the care and custody of the Marshal, and was lying where he had left her in the river; that said libel and cross-libel were discontinued on the 13th day of November, 1909, by order of the attorneys respectively of the libelants and cross-libelant.

Thereupon the defendant, in order to maintain the issues on his part joined, offered testimony tending to prove that the said boat was at the time of its seizure by him, on the 13th day of November, 1906, in a bad condition and of little or no value, and that it was a safe and proper place to leave the "India" in deep water throughout the freezing weather of December, 1906, and January and 12 the early part of February of 1907, if her pipes had been emptied and properly closed and protected from freezing and bursting.

That at the time the said warrant of arrest was placed in the hands of the defendant for execution, he, said defendant, was instructed by the attorney for the said libelants not to place a watchman aboard of her or involve him in greater expense than was necessary. And thereafter no further or other instructions were given to the defendant by the libellants or cross-libellant in said cause as to the care and custody of said boat.

And this was the substance of all the evidence adduced before the jury at the trial of this cause.

Thereupon and before the case was submitted to the Jury, the plaintiff by his counsel requested the Court to instruct the Jury as follows:

I.

"You are instructed that if you find that a Warrant of arrest issued in the admiralty libel case of Moore vs. Costello (No. 700 District Docket) and was served upon the steam-yacht "India" by tacking up on her a copy thereof, said boat immediately became "libelled", and was in contemplation of law in the custody and under the control of the defendant, the U. S. Marshal; and if you find that said libel suit was afterwards dismissed, and that thereupon demand was made by the said plaintiff upon the said defendant for the return to said plaintiff of his steam-yacht "India", and that said steam-yacht "India" has never been returned to him; then if you further find from all the facts and circumstances in the case,

13 that said defendant failed to exercise reasonable care to safeguard and safely keep said boat while it was under his control and in his custody, whereby said steam-yacht was sunk, your verdict must be for the plaintiff."

To the granting of which prayer counsel for defendant then and

there objected, but the Court overruled said objection and granted said prayer and instructed the Jury accordingly, to the granting of which prayer counsel for the defendant, then and there noted an exception, which was duly allowed by the Court.

The plaintiff by his counsel further requested the Court to instruct the Jury as follows:

II.

If you find for the plaintiff, your verdict should be for the fair market worth of the steam-yacht "India", at the time she was sunk, together with interest thereon, if you find plaintiff properly entitled thereto at the rate of six per centum per annum from November 22, 1909, (the date when demand was made by the plaintiff upon the defendant to return said steam-yacht "India" after the termination of the admiralty libel suit No. 700 District Court.)

The foregoing prayer was granted by the Court.

The plaintiff by his counsel further requested the Court to instruct the Jury as follows:

III.

If you find the steam-yacht "India" was libelled and arrested by the defendant, then you are instructed, as a matter of law that she immediately passed out of the possession and from under the management and control of her owner, plaintiff herein, into the
14 hands of the defendant, the United States Marshal, who having such possession, custody and control thereafter was responsible for the exercise of reasonable care for her safe keeping."

To the granting of which prayer counsel for defendant then and there objected, but the Court overruled said objection, and granted said prayer, to the granting of which prayer counsel for the defendant then and there noted an exception, which was duly allowed by the Court.

Thereupon and before the case was submitted to the Jury, the defendant by his counsel requested the Court to instruct the Jury as follows:

I.

"The jury are instructed that if they find from the evidence that on or about November 13th, 1906, the defendant Aulick Palmer, as United States Marshal in and for the District of Columbia, arrested and took into his custody the steam-yacht "India", mentioned in the declaration, in obedience to a warrant therefor, issued out of the Supreme Court of the District of Columbia; it then became the duty of the said defendant to observe and use such care and caution in guarding and preserving said steam-yacht as an ordinarily careful and prudent man would use in guarding and preserving his own property of like kind and value; and the jury are further instructed that the burden of proof in this case is upon the plaintiff, and that they must find for the defendant, unless they find, from the preponderance of the evidence, that said steam-yacht "India", being then the property of the plaintiff, sank in the Potomac River while in the custody of the defendant, as aforesaid, and that said sinking

15 was proximately caused by the failure of the defendant to use such care and caution in guarding and protecting said steam-yacht as an ordinarily careful and prudent man would have used."

The foregoing prayer was granting by the Court.

The defendant by his counsel further requested the Court to instruct the Jury as follows:

II.

"The jury are instructed that if they find from the evidence that the defendant arrested the yacht "India" on the thirteenth day of November, 1906, and held her in his custody until the end of January 1907, and that he did not place or maintain a watchman aboard her while in his custody, and did not haul her out of the water, the failure to so place a watchman aboard her and the failure to haul her out of the water, did not necessarily constitute negligence; but it is for the jury to determine, from all the evidence adduced in this cause, what would constitute negligence and what would constitute reasonable care of the said yacht while in his custody as Marshal as aforesaid.

The foregoing prayer was granted by the Court.

The defendant by his counsel further requested the Court to instruct the Jury as follows:

III.

"The jury are instructed that, if they find from the evidence that the launch "India" mentioned in the declaration, was, on or about the thirteenth day of November, 1906, arrested and taken into custody by the defendant, as United States Marshal in and for the District of Columbia, pursuant to a writ issued out of the Supreme

16 Court of the District of Columbia, and that, when said writ was placed in his hands for execution, he was instructed by the plaintiff in the cause in which said writ was issued, or by the attorney of said plaintiff, not to take the said launch into actual physical custody, but to permit her to remain moored where he then should find her, and that in obedience to said instructions the defendant allowed the said launch to remain in the place where he then found her, and that the plaintiff in this cause was then the owner of said launch, and that he knew, after the defendant had arrested said launch, that no watchman had been placed aboard her, and that she had not been hauled out of the water, and that he made no complaint thereof, nor objection thereto, they may find that he acquiesced therein; and if they so find, and further find that the said launch sank at her moorings in the Potomac River, their verdict must be for the defendant, even if they further find that the proximate cause of such sinking was the fact that no watchman was placed on board of said launch, or that said launch was not hauled out of the water."

Counsel for the plaintiff objected to the granting of said prayer and the Court sustained said objection and refused to grant said prayer, to which refusal counsel for defendant noted an exception which was duly allowed by the Court.

Thereupon and before the case was submitted to the Jury, the defendant by his counsel requested the Court to instruct the jury as follows:

IV.

17 “The jury are instructed that if they find from the evidence that the launch “India” was, at the time she was taken into the custody of the defendant, and with the knowledge of the plaintiff, in such condition as to require the exercise of more than ordinary care in guarding her from loss or injury, and that said defendant was ignorant of such condition, it became and was the duty of the plaintiff to notify the defendant of such condition; and if they find further that the plaintiff, under such circumstances, failed to notify the defendant of such condition, and that such condition was the proximate cause of the sinking of the launch “India” in the Potomac River, while in the custody of the defendant, they must find for the defendant.”

Counsel for the plaintiff objected to the granting of said prayer and the Court sustained said objection and refused to grant said prayer, to which refusal counsel for defendant noted an exception which was duly allowed by the Court.

Thereupon and before the case was submitted to the jury, the defendant by his counsel requested the Court to instruct the jury as follows:

V.

18 “The jury are instructed that if they find from the evidence that the plaintiff, on or about the thirteenth day of December, 1906, filed in a cause, District Number 700, pending in the Supreme Court of the District of Columbia, his cross-libel against the libellant in said cause, and against the launch “India”, and if they find that at that time plaintiff knew that no watchman had been placed aboard said launch by the defendant, and that she had been left at the place and in the condition in which the plaintiff himself had moored her in the Potomac River, then they shall find that the plaintiff acquiesced in the action of the Marshal, and shall find for the defendant, provided they further find that said plaintiff did not at that time, nor at any time thereafter, make complaint to or demand of the defendant that he place a watchman aboard said launch, or haul her out of the water, or take other or different methods of guarding and protecting her from those he had hitherto adopted.”

Counsel for the plaintiff objected to the granting of said prayer and the Court sustained said objection and refused to grant said prayer, to which refusal counsel for defendant noted an exception which was duly allowed by the Court.

Thereupon the Court instructed the Jury as to the law of the case in accordance with the rulings of the Court made at the trial in the granting and refusal of the prayers hereinbefore set forth.

All the foregoing proceedings were had, and exceptions taken and noted by the Court in its minutes, before the Jury retired to consider its verdict.

And the defendant prays the Court to sign this, his bill of exceptions, this to have the same force and effect as to each of the said exceptions as though the same were set forth in a separate bill of exception, which is granted; and accordingly, the Court signs this, the defendant's bill of exceptions to have the force and effect aforesaid, now for then, this 10th day of March, 1913.

ASHLEY M. GOULD, *Justice*.

19

Assignments of Error.

Filed March 10, 1913.

* * * * *

1. The Court below first erred in granting plaintiff's first prayer of instructions.

2. The Court below erred in granting plaintiff's second prayer of instructions.

3. The Court below erred in refusing to grant defendant's third prayer of instructions.

4. The Court below erred in refusing to grant defendant's fourth prayer of instructions.

5. The Court below erred in refusing to grant defendant's fifth prayer of instructions.

CLARENCE R. WILSON,
Attorney for Defendant.

Designation for Transcript of Record.

Filed March 10, 1913.

* * * * *

Comes now the defendant by his attorney, and designates the following portions of the record for the transcript on appeal.

1. Declaration.

2. Pleas.

3. Verdict.

4. Motion for new trial.

20 5. Judgment on Verdict.

6. Memorandum of Bond on Appeal.

7. Memorandum of extension of time to settle Bill of Exceptions.

8. Memorandum of extension of time to file transcript of record.

9. Bill of Exceptions.

10. Assignments of Error.

11. This designation.

CLARENCE R. WILSON,
Attorney for Defendant.

21 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 20, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 52252 at Law, wherein John F. Costello is Plaintiff and Aulick Palmer is Defendant, as the same remains upon the files and of record in said Court.

In testimony Whereof, I hereunto subscribe — name and affix the seal of said Court, at the City of Washington, in said District, this 28th day of March, 1913.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2539. Aulick Palmer, appellant, vs. John F. Costello. Court of Appeals, District of Columbia. Filed Mar. 29, 1913. Henry W. Hodges, clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

JUN.-12-1913

IN THE *Henry W. Hodges*
Clerk.

Court of Appeals, District of Columbia.

APRIL TERM, 1913.

No. 2539.

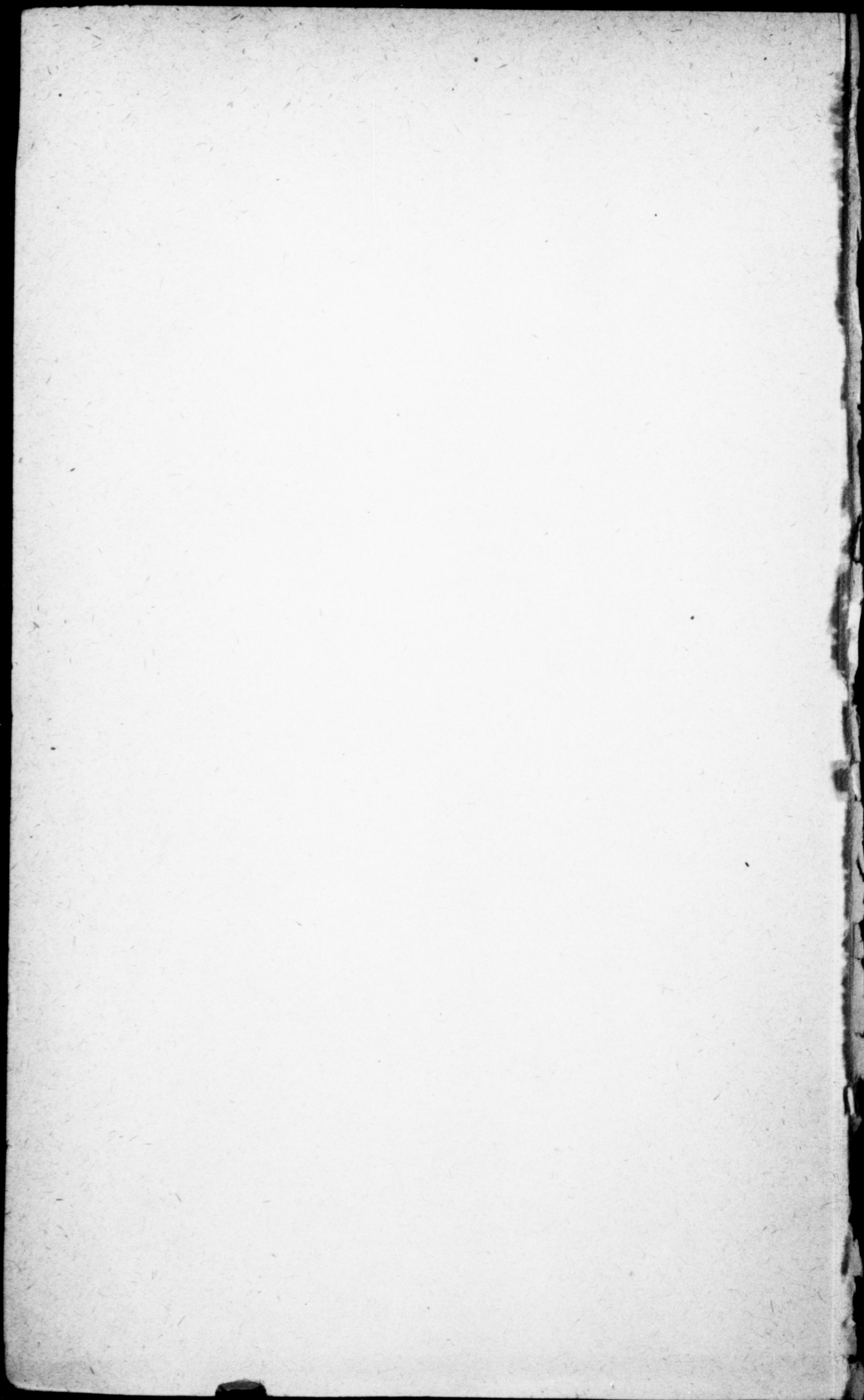
AULICK PALMER, APPELLANT,

vs.

JOHN F. COSTELLO, APPELLEE,

BRIEF ON BEHALF OF THE APPELLANT.

CLARENCE R. WILSON,
Attorney for Appellant.



IN THE
Court of Appeals, District of Columbia.

APRIL TERM, 1913.

No. 2539.

AULICK PALMER, APPELLANT,

vs.

JOHN F. COSTELLO, APPELLEE,

BRIEF ON BEHALF OF THE APPELLANT.

Statement of Facts.

This is an appeal from a judgment of the Supreme Court of the District of Columbia, entered upon a verdict of a jury against the appellant, defendant below, for the sum of five hundred dollars, interest and costs, awarded to the plaintiff as damages for the loss of a boat of the plaintiff while in the custody of the appellant, as marshal, through his alleged negligence.

By his declaration appellee, plaintiff below, sued to recover damages from Aulick Palmer, United States marshal

in and for the District of Columbia, for the loss to him of a boat, the "India," which the marshal had seized in the execution of a warrant of arrest issued in the case of *Moore vs. The "India,"* number 700, district docket. The cause of action was based upon the alleged negligence of the marshal in failing to put a watchman aboard the boat after he had seized her and in failing to haul the vessel out of the water when cold weather set in, in the winter of 1906-1907.

The jury returned a verdict in favor of the plaintiff in the sum of five hundred dollars.

At the trial it was proved that the "India" was seized by the marshal under a writ issued in the libel suit above mentioned, and that at the time the warrant of arrest was placed in his hands for execution the attorney for the libellants instructed him not to place a watchman aboard the boat or involve him in any greater expense than was necessary (Record, p. 7). Accordingly, he did not put a watchman aboard her or take any steps looking to her preservation or care, but left her unguarded in the Potomac River at the foot of Thirteenth street, where she had been moored by her owner, John F. Costello, plaintiff below, appellee herein. The sum claimed in the libel suit was seventy-nine dollars and sixty-seven cents (\$79.67), alleged to be due to the libellants, W. S. Moore's Sons, by Costello for repairs made to the boat (Record, p. 5).

Evidence was offered that the boat was in good condition at the time she was arrested and was reasonably worth from \$1,000 to \$1,200, and that during the fall weather the place in which she was found by the marshal was a safe place in which to keep her.

Evidence was further offered that a reasonable and prudent man, during the period from November, 1906, to February, 1907, would have drawn the boat out of the water, or would have kept a watchman aboard her, or would have emptied and closed up the pipes leading into the water, or properly protected them by wrapping and packing them, in order to prevent their freezing and bursting.

Defendant, following the directions of the attorney for the libellants, did not take any of these precautions; and in the last part of January or early part of February, 1907, at a time when there was ice on the river, the boat sank and became a total loss.

On the 13th of December, 1906, about a month after the "India" was libeled by W. S. Moore's Sons for \$79.67, and while she was still safe and sound in the place where Costello had left her, he, plaintiff below, filed a cross-libel in the same suit, claiming of the libellants the sum of six hundred dollars (\$600) as damages for and in respect of loss of trade and profit suffered by him by reason of the workmanship upon the said boat in the improper emplacement of a certain keel condenser (Record, p. 7). At the time he filed this cross-libel, and continuously thereafter until she sank in February, 1907, appellee knew that the vessel was lying where he had left her in the river, and that nothing had been done by the marshal looking to her safe custody.

The plaintiff on cross-examination testified in substance as follows:

That he learned that his boat had been arrested and was in the custody of the marshal on the 14th or 15th day of November, 1906; that between the time of the libeling of his said boat and her sinking plaintiff had only been to the boat-house about three times; that from the time of the libeling up to the time the boat sank he knew she was lying in the same place in which he had left her, and that if the river froze she might sink, although he knew likewise that the marshal had the boat in his care and custody, and that he had no business to tell him so, as he, said plaintiff, thought it would appeal to the marshal to look after his own business, and if he, said plaintiff, meddled with what he considered he had nothing to do with, he knew he was likely to get into trouble; that up to the time he was last down to the boat-house—some time in the Christmas

week—plaintiff knew that the marshal had not hauled said boat out and had not any watchman aboard her; that he never during the said period made complaint to the defendant of his failure to haul the said boat out of the water or place a watchman aboard her, and never requested the marshal to do anything to preserve the said boat from injury or destruction, as he, said plaintiff, did not know the boat was going to sink, and had not thought anything about it, and did not consider that he had anything to do with the boat or looking after her after the marshal had arrested and taken her from him, said plaintiff, into his own custody for safe keeping; that he knew that he could have given bond and taken the boat in his own possession, and that he did not give bond because it would have been difficult and expensive for him to have furnished such a bond, and he did not consider he could do anything with the boat after the marshal had taken possession of her.

On behalf of the defendant testimony was offered tending to prove that at the time of the seizure of the vessel by the marshal she was in bad condition and of little or no value, and that the place in which he left her was a safe and proper place for her even in the winter months if her pipes had been emptied and properly closed or protected from freezing and bursting.

The principal points now relied upon as requiring a reversal of the judgment of the court below are the third assignment of error, based upon the refusal of the court to grant defendant's third prayer for instructions, and the fifth assignment of error, based upon the refusal of the court to grant defendant's fifth prayer for instructions.

Error is also assigned to the granting by the court below of the first and third prayers requested by the plaintiff. These prayers, though they may be correct when considered alone, are erroneous, if the propositions of law embodied in defendant's third and fifth prayers are correct; they are

therefore erroneous as being inconsistent with those prayers for instructions.

The third and fifth prayers are as follows:

"III.

"The jury are instructed that, if they find from the evidence that the launch 'India,' mentioned in the declaration, was, on or about the thirteenth day of November, 1906, arrested and taken into custody by the defendant, as United States marshal in and for the District of Columbia, pursuant to a writ issued out of the Supreme Court of the District of Columbia, and that, when said writ was placed in his hands for execution, he was instructed by the plaintiff in the cause in which said writ was issued, or by the attorney of said plaintiff, not to take the said launch into actual physical custody, but to permit her to remain moored where he then should find her, and that in obedience to said instructions the defendant allowed the said launch to remain in the place where he then found her, and that the plaintiff in this cause was then the owner of said launch, and that he knew, after the defendant had arrested said launch, that no watchman had been placed aboard her, and that she had not been hauled out of the water, and that he made no complaint thereof, nor objection thereto, they may find that he acquiesced therein; and if they so find, and further find that the said launch sank at her moorings in the Potomac River, their verdict must be for the defendant, even if they further find that the proximate cause of such sinking was the fact that no watchman was placed on board of said launch, or that said launch was not hauled out of the water."

"V.

"The jury are instructed that if they find from the evidence that the plaintiff, on or about the thirteenth day of December, 1906, filed in a cause, district number 700, pending in the Supreme Court of the District of Columbia, his cross-libel against the libelants in said cause, and against the launch 'India,' and if

they find that at that time plaintiff knew that no watchman had been placed aboard said launch by the defendant, and that she had been left at the place and in the condition in which the plaintiff himself had moored her in the Potomac River, then they shall find that the plaintiff acquiesced in the action of the marshal, and shall find for the defendant, provided they further find that said plaintiff did not at that time, nor at any time thereafter, make complaint to or demand of the defendant that he place a watchman aboard said launch, or haul her out of the water, or take other or different methods of guarding and protecting her from those he had hitherto adopted."

The legal basis for the third instruction is:

It is the duty of a party having knowledge that his property is endangered through the negligence of another who may be charged with the temporary duty of its care and custody, to take reasonable measures to avert damage which would be caused to the property through that negligence, and if, with full knowledge of the dangers to which his property is exposed, he fail to take such measures, he cannot be heard to complain of consequent loss.

The legal basis for the fifth instruction is:

By Costello's answer to the libel and claim of ownership of the vessel, and by his cross-libel filed December 13, 1906, he became an actor in the litigation, and having full knowledge that the vessel seized by the marshal to answer the claim of the libelant was endangered through the negligence of the marshal, it was his duty to notify the marshal of such dangers or to notify the court of the danger to the property in the custody of the court, or take steps himself to avert damage or destruction to the property in question.

The refusal of the court below to grant the instructions above set forth are the only errors now relied upon. They will be separately presented.

I.

Plaintiff's Duty to Avert Damages.

It is entirely in accord with the dictates of common sense that a person who sees his property endangered through the negligence of another who, perhaps, owes the immediate duty of care, having the property in his custody, shall be required to take reasonable measures to protect his property, under penalty of suffering the loss consequent upon the opposite party's negligence. Thus, if I see another endangering my house through his negligence, so that it is about to be set fire to, clearly I could not stand idly by and make no attempt to put out the fire that has thus been started, when prompt efforts on my part would certainly succeed, and then claim the full value of the house after it was wholly destroyed by the fire. Or if I bail my automobile to a bailee for hire, and to my knowledge he leaves it standing in a place of great danger, where its destruction is momentarily threatened, I cannot stand by and watch the happening of the impending destruction, and then claim the full value of the automobile from the bailee, provided I could, by simple measures, have prevented its destruction.

An analysis of the situation in these cases and in the present case discloses that the person suffering the damage was *willing* that the damage be suffered by him. In each case, the person damaged could have prevented the loss, but he wanted it to happen. Common sense, common honesty, and the common law prohibit such a one from recovering the damages for the loss that he himself invited. The doctrine applicable is "*Volenti non fit injuria*."

Street, in his "Foundations of Legal Liability," says:

"This maxim (*volenti non fit injuria*) means that a man who consents to the doing of an act cannot maintain an action in respect of the damage which

results from that act. The consent of the sufferer takes away the injurious character of the act. The idea is very rudimentary in legal science (citing Aristotle's Ethics, IX, 6), and the conception was familiar in Roman law (citing Dig. XLVII, 10, 1, 5, and Y. B., 33-35, Edw. I (Rolls, *id.*, 8)).

"Primarily the maxim applies where there is actual consent by the sufferer to the doing of the particular act which causes the harm. A merchant, for instance, who consents to the stowage of his goods on the deck of a ship has no remedy against the ship-owner for damage sustained by the cargo in consequence of such stowage (citing *Gould vs. Oliver*, 4 Bing. N. C., 142; 33 E. C. L., 305). And one who has agreed to take part in an operation necessitating the production of fumes injurious to health, has no cause of action in respect of bodily suffering or inconvenience resulting therefrom, though another person residing near to the seat of these operations might well maintain an action if he sustained such injuries from the same cause (citing Lord Herschell in *Smith vs. Baker* (1891) A. C., 360). A husband who is consenting to adulterous conduct on the part of his wife can maintain no action for damages against her paramour. Upon the same ground a woman is disabled from recovering damages of her seducer. In this primary sense the maxim represents a universal qualification of legal liability and finds illustration in every department of tort."

In support of the instances mentioned in the text, Street cites the following cases:

Dubuly vs. Gunning, 4 T. R., 656.

Winter vs. Flinn, 4 C. & P., 494; 19 E. C. L.

Prettyman vs. Williamson, 1 Penn. (Del.), 224.

Weaver vs. Bachert, 2 Pa. St., 80.

Judge Penniwell, of Delaware, in applying the principle to a case of criminal conversation (*Prettyman vs. Williamson*, *supra*), said:

"* * * it is a general rule of law that no one can maintain an action for a wrong when he has consented or contributed to the act which occasions the loss" (p. 237).

Chief Justice Gibson, of Pennsylvania, found the principle applicable to a case of seduction (*Weaver vs. Bachert, supra*). In the course of his opinion he said:

"A woman is not seduced against her consent, however basely it be obtained; and the maxim *volenti non fit injuria* is as applicable to her as to her husband, whose consent to his own dishonor bars his action for criminal conversation. This maxim runs through a variety of actions, such as those for injury for mutual negligence; or for recovery back of money voluntarily paid, where there was no debt; and some others. It extends even to contracts in the framing of which the parties are equally culpable, the consideration being immoral or illegal."

In this country, this doctrine has found its most extensive use in negligence cases where the defense is made that the plaintiff, being the servant of the defendant, assumed voluntarily the risk which resulted in his injuries. There is no reason, however, why its application should be limited to this or any other particular class of cases. As Street says:

"The maxim represents a universal qualification of legal liability, and finds illustration in every department of tort."

In every case, therefore, where we find a plaintiff willing that the after-complained-of injuries be inflicted upon him, the courts will refuse relief, even though the damage resulted to him through another's negligence.

In *Mark vs. Hudson River Bridge Company*, 56 How. Pr., 108, 120, plaintiff's tugboat collided with the bridge of the defendant company. In order to save the bridge, defendants endeavored to move the tug from under the bridge, and in so doing, and through their negligence,

caused parts of the bridge to fall upon the tug and thus place her in a dangerous position. In this dangerous position, brought about through defendants' negligence, they, the defendants, left her. The dangerous position of the tug was known to the plaintiff, who did nothing to save her, and she subsequently sank. Plaintiff sued to recover her full value, but the court held that the plaintiff could recover only for injury and damage done to the boat by her removal and the fall of the bridge upon her, and not for subsequent damage which happened after the plaintiff could have relieved the boat. In the course of his opinion the court said:

"Why, then, was not the boat relieved from the weight upon it, and taken care of by the plaintiff? Was it because no help could be procured? There was no evidence of that sort at the trial. Mr. Mark, one of the plaintiffs, and their general manager, saw, as he swore, the boat gradually sinking from the weight of the bridge material upon her, and did nothing. Why? The answer he gave, himself, as taken down upon my own minutes, was: 'I could have got tugs and help, but as I had not pulled the bridge on her I did not think I had any business to take care of it.' There was absolutely no evidence which could have justified the jury in finding that the plaintiffs could not have relieved the boat, and it was, therefore, clearly erroneous to submit to them any such question (*Storey vs. Brennan*, 15 N. Y., 524).

"It is no answer to this difficulty to say that the boat was there sunk and that all damages had been done which were done. Thus, at least, it was a disputed question, and the weight of the evidence and of all probability are against it. By the undisputed facts the jury should have been instructed that the plaintiffs could only recover, if at all, for the injury and damage done to the boat by her removal and the fall of the bridge upon her. That for all injuries which occurred after the plaintiff could have relieved her, there could be no recovery."

In *Western Real Estate Trustees vs. Hughes*, 172 Fed. Rep., 206, the principle was applied in a case where plaintiffs failed to exercise reasonable care to avoid a danger to their building brought about by the negligent construction of a party wall by an adjoining owner. The court, by Vandeventer, circuit judge, said (p. 211):

"Quite apart from any negligent contribution by the plaintiff to the falling of the wall, and after correctly stating that one whose property is endangered through the negligence of another is required to exercise reasonable care to *avoid* or lessen the threatened injury, and can then charge the delinquent with labor and expense properly incident thereto, the court instructed the jury that if the plaintiff by the exercise of reasonable care could have removed all or a part of his property from the building after discovering that the wall was in danger of falling, and he failed to do so, he could recover only such of the damages sustained as would not have been avoided by so doing."

The court held these instructions proper. The defendant contended, however, that if the plaintiff negligently failed to lessen his damage, he was without any right of recovery; but the court held that the negligent failure to lessen the damages is not a loss of all right of recovery, but eliminates from the recovery such damages as could have been avoided by the injured party by the exercise of reasonable care.

In the present case, of course, the exercise of reasonable care by the plaintiff would necessarily have avoided all loss, and his negligence in this respect is therefore the destruction of his cause of action.

To the same effect see:

Factors and Traders Insurance Co. vs. Werlein, 42 La. Ann., 1046; 11 L. R. A., 361,

in which the basis of the maxim is shown to be established in the civil law as well as in the common law.

In *Harrison vs. Missouri Pacific Railway Company*, 88 Mo., 625, defendants, through the negligent running of one of their trains, struck and injured a cow, property of the plaintiff. The plaintiff abandoned the maimed and lacerated carcass, and as a result of want of care the cow died. She could have been slaughtered, at least, for beef, hide, and tallow. The court held that the plaintiff was not entitled to recover the full value of the cow, but only her value less what could have been obtained for the cow after the injury.

In *Pennsylvania Ry. Co. vs. Washburn*, 50 Fed. Rep., 335, a canal-boat sank at the wharf through the fault of the wharfinger. She sank at low tide, and damage to her cargo was done by the incoming tide. The libelant could have saved this damage by employing men to take out the cargo before the tide rose. It was held that there could be no recovery for the damage thus sustained. The court, Brown, district judge, said:

"I cannot conceive that a man of reasonable prudence, looking after the interest of his own property, could hesitate a moment in such circumstances to employ any effective labor that was at hand, without regard to the rate of wages demanded within any such limits as the present case presents. It was therefore the reasonable duty, both of the captain of the canal-boat and of the foreman when he arrived on the scene, during the four or five hours that elapsed after the canal-boat careened until the Lamokin's arrival, to remove all the cargo that was possible, and to accede to the price of wages demanded, if other timely help was not procurable. * * * The obligation to use all reasonable diligence after an injury in cases of collision, or other maritime torts, to prevent subsequent increase of damages, is well settled in courts of admiralty; and the rule at law is similar."

In *Hamilton vs. Feary*, 8 Ind. App., 615, appellant sued a landlord for injuries caused by a defect in the premises which the landlord had agreed to repair. He failed to repair it, and the plaintiff occupied the premises with knowledge

of the defect. It was held that her failure herself to make the necessary repairs barred her of her right of recovery.

In *Missouri ex rel. Rice vs. Powell*, 44 Mo., 436, suit was brought against a sheriff on his official bond to recover for damage suffered through the wrongful sale of land for taxes alleged to have been unpaid. The court held the acts of the sheriff wrongful and his bond liable. In the course of his opinion the court said:

"It is perfectly clear that the sheriff was altogether mistaken in his duty and failed, according to the condition of his bond, to 'faithfully perform all duties of his office of collector according to law,' by refusing to receive the taxes due upon the land, and by afterward returning the land delinquent. But it is not so easy to determine the measure of damages to which the plaintiffs are entitled. It was in their power, with very little trouble and expense, to appear before the county court and object to a judgment against the land; and we are bound to suppose that if they had so appeared no judgment would have been rendered, or, at least, none except for the taxes due upon the land, with interest and costs. This judgment they could have paid, and the only damage they would have suffered would have been their reasonable expense for attending the court, and the interest and costs imposed in the judgment, over and above the amount originally due.

"It is now well settled that one who is injured by another has no right to lie by and suffer damages to accumulate which it is in his power to prevent. He must use proper diligence to prevent or arrest the effect of the injury. Whatever he voluntarily suffered, which by reasonable exertion he might avoid, he must charge to his own account."

In the present case not only could Costello have notified the marshal or the court of the marshal's alleged negligence and the danger to which his boat was exposed, but by slight effort and upon small cost he could have gotten immediate possession of the boat by filing a stipulation, pursuant to rule 11 of the admiralty rules of this court.

The doctrine is briefly but clearly discussed in *Douglas vs. Stephens*, 18 Mo., 362, 366, in which plaintiff's goods were damaged by the alleged obstruction of a sewer by the servants of the defendant. It appeared that the plaintiff could have stopped the damage by removing the obstruction. The court said, in holding that the plaintiff was not entitled to recover for such damages as he might have avoided:

"If a party sustaining an injury by the act of another, can protect himself at a trifling expense, or with reasonable exertions, from the consequences, he fails in social duty if he omits to do so, regardless of the increased amount of damages for which he may intend to hold the other party liable. This case is put in the books: Suppose a man should enter his neighbor's field unlawfully, and leave the gate open; if, before the owner knows it, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open, and passes it frequently, and willfully and obstinately, or through gross negligence, leaves it open and cattle get in, it is his own folly. So, if one throw a stone and break a window, the cost of repairing the window is the ordinary measure of damage. But if the owner suffers the window to remain without repairing a great length of time after notice of the fact, and his furniture and pictures and other valuable articles sustain damage, or the rain beats in and rots the window, this damage would be too remote. Greenleaf says, that in all cases of breach of contract, if the party injured can protect himself from damage at a trifling expense or by any reasonable exertions he is bound to do so. He can charge the delinquent party only for such damages as, by reasonable endeavors and expense, he could not prevent. The same doctrine is equally applicable in cases of trespass. 2 vol., sec. 261, and note."

Under a somewhat similar state of facts, in *Lloyd vs. Jones*, 60 Vt., 288, the court said:

"It is the duty of a person injured by the fault of another to use all reasonable means to protect himself against injurious consequences. If injured in his

person, he must attend to his cure. If injured in his estate, he must attend to its preservation. If he fails in this duty, he cannot gather the fruits of his own negligence."

It will be argued that the present case is materially different from those above cited, in this, that in those cases plaintiff had the lawful and immediate possession or right of possession of his property, and could therefore have taken immediate steps to safeguard it, whereas in the present case possession and the right of possession of his property was taken out of Costello by the marshal, and he was therefore powerless to do anything. This is not so, for, as a matter of fact, he exercised acts of ownership over the vessel during the time the marshal had it. He sent men aboard her to inspect her with a view to purchase, and there was nothing in fact or in law to prevent him from hauling her out of the water, or at least stopping her pipes, which, according to the evidence, would prevent her sinking, and, as pointed out above, he could have given stipulation upon a slight cost and procured immediate possession of his boat, or by simply opening his mouth and speaking to the marshal or to the court, he could have procured the necessary diligence which would have completely avoided his loss.

It seems to be a typical case of one not only willing but anxious that injury be done him. He preferred a cause of action against the marshal, with a possibility of getting a verdict for more than the boat was worth to him, to the boat itself. To use the court for effectuating such a purpose is contrary to good morals.

II.

By filing his answer and claim and cross-libel Costello became an actor in the litigation, and as such was bound to notify the marshal or the court of the alleged negligence in the care of the boat seized by the marshal.

As heretofore pointed out, Costello in his answer, filed on the 12th day of December, 1906, set out his ownership of the vessel. As he claimed the ownership, his proper course was to file, with his answer, his claim, but inasmuch as he distinctly averred ownership, his answer was in essence a claim. (See rules 26 and 28, Admiralty Rules, Supreme Court of the District of Columbia.)

In *United States vs. 422 Casks of Wine*, 1 Peters, 547. Mr. Justice Story said:

“In such suits (proceedings in admiralty) the claimant is an actor, and is entitled to come before the court in that character only, in virtue of his proprietary interest in the thing in controversy; this alone gives him *persona standi in judicio*. It is necessary that he should establish his right to that character, as a preliminary to his admission as a party *ad litem*, capable of sustaining the litigation.”

But Costello in this case went further than simply filing his claim and answer. On the 13th of December, 1906, more than a month before the vessel sank, he filed his cross-libel against the libellants and the vessel, and thereby sought affirmative relief from the court in respect of the *res* which the court had in its possession. As cross-libelant, the marshal was acting for him in the same sense that he was acting for the libelants when the vessel was originally seized. Consequently he cannot be heard to complaint of the negligent treatment of the boat by the marshal, of which he had complete and full knowledge, and to which he made no ob-

jection. The cross-libelant is in the same situation as the libellants with respect to the manner of procedure for the enforcement of his rights. See:

Ward vs. Chamberlain, 21 Howard, 572, 574.
Hawgood Transit Company vs. Dingman, 94 Fed.,
 1011, 1015.

In *Ward vs. Chamberlain* (*supra*) it was said:

“Respondents on a dependent libel have the right, in a proper case, to institute a cross-libel to recover damages against the libelants in the primary suit; but they should file their libel, take out process and have it served in the usual way; and when that is done, the libelants in the first suit regularly become respondents of the cross-libel, and, as such, they must answer or stand the consequences of default.”

Although Costello had previously set up his ownership, yet by his cross-libel he was asserting a claim against the original libelants which, in the event of success, would be established by a decree against the libelants and against the vessel. It might well have been that an intervener might have presented a claim to the vessel against Costello's claim, and have established it in the final decree. In this event, though Costello would lose his claim of ownership, he could nevertheless have the vessel sold to satisfy the claim set up in his cross-libel. This illustrates the theory of the pleadings, and indicates conclusively that Costello, by his cross-libel, was looking not only for a personal decree against the original libelants, but for a decree against the *res* in the hands of the marshal. Hence it is that upon the filing of the cross-libel the courts require process to be served as upon the filing of the primary libel.

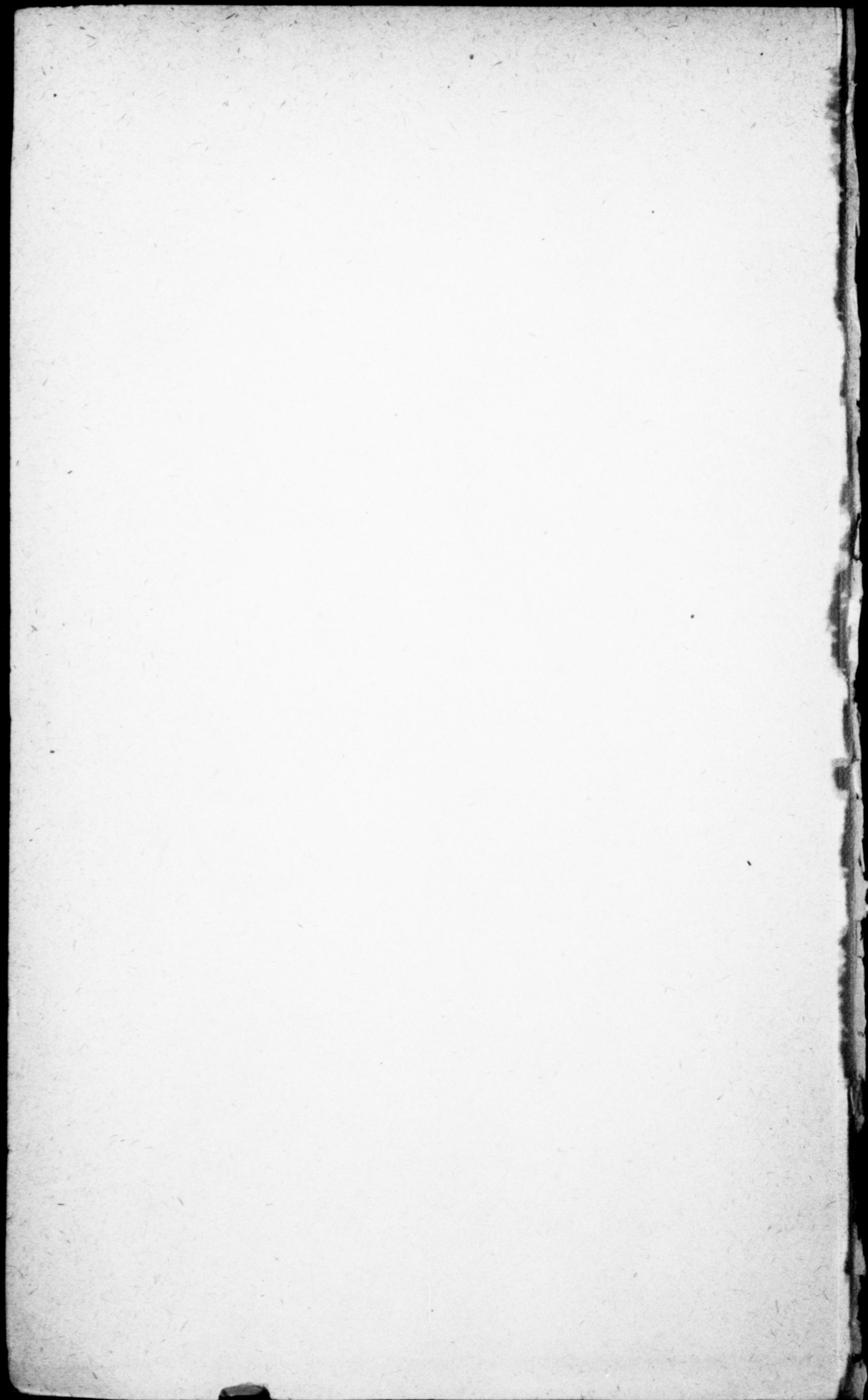
Since Costello thus asserted his interest in the vessel in the hands of the marshal, he cannot be heard to complain of the alleged negligence of the marshal committed with his full knowledge and consent.

It is respectfully submitted that for these reasons the prayers asked for at the trial by the defendant should have been granted and that for the error in the refusal to grant them a new trial should be awarded.

CLARENCE R. WILSON,
Attorney for Appellant.

[21570]





IN THE
Court of Appeals, District of Columbia.

April Term, 1913.

No. 2539.

AULICK PALMER, *Appellant*,
v.
JOHN F. COSTELLO.

APPELLEE'S BRIEF.

The facts sufficiently appear in appellant's brief.

A single question of law is raised thereon.

Whether the maxim *volenti non fit injuria* is usable in defense of the action.

As two elements are indispensable to the proper application of this principle of law to any given state of facts,—viz: control of one's own, and consent to the perpetration of wrong thereon,—and as these indispensable elements are entirely lacking in the case at bar, the maxim can have no bearing here.

The law cited by appellant is good law.

Its fallacy only appears when twisted into application with the present facts.

It were easy, therefore, though scarcely necessary or even profitable, to show herein how different these cited cases are from the case at bar.

Appellee, who was plaintiff below, and who will continue herein to be called such, obtained a verdict against the marshal of the District of Columbia for his neglect

and abandon of what the law had placed in his care and custody for safe keeping.

The marshal,—referred to herein as defendant,—while acknowledging his own negligence, seeks to shift the burden of responsibility upon the plaintiff, on the theory that he had destroyed his right of recovery below by his own contributory negligence.

In other words, the defendant, after being directed by the court in warrant of libel to take plaintiff's boat "into his possession for safe custody"; after he had carried out his duty to the extent of arresting, taking charge of and detaining said boat; and after he had thereby proclaimed to the world, and particularly to the plaintiff owner of the boat, that the law had taken possession of her and brooked no interference; the plaintiff is sought to be made answerable for the subsequent sinking of his boat because, supposedly, consenting to her sinking.

Away at the time, a visitor at the boathouse (opposite to which and on the other side of the channel from which lay plaintiff's boat), only on three occasions between the libeling of the boat and her sinking, and that for the last time not later than the Christmas week of 1906,—while the boat sunk the last of January or early part of February, 1907—; without knowledge that the boat was going to sink; without thinking anything at all about it; considering he had nothing to do with the boat, and nothing to do with looking out for her after the marshal had arrested and taken her from him (R. 6); what a far-fetched endeavor it is to invoke to such a situation of fact the maxim *volenti non fit injuria*.

This maxim can scarcely be intended to mean aught but what the phrase itself expresses.

It is only when there is a right of control and the voluntary acquiescence in a wrong perpetrated thereon, that the law steps in and prevents an injury being suffered at the expense of another.

Could it be said in this case that the plaintiff had control of what the law had taken from him? That he had the right to set up his individual judgment as against the law's command? That he had the power to dictate as to what should or should not be done with what the law had taken charge of? Or, that he had consented to the filing of the libel suit against him; or the taking of his boat from him; or the retention of his boat when she could advantageously have been used by him; or the sinking of his boat, to his consequent loss, when he knew nothing of what was going to happen, and did not even think of what might or could happen to her?

It scarcely lies in the mouth of the defendant to prate about "good morals," or say that the plaintiff was "not only willing, but anxious that the injury be done him," as "he preferred a cause of action against the Marshal, with a possibility of getting a verdict for more than the boat was worth to him, to the boat itself," in his effort to apply this maxim; for the evidence does not even support such a supposition. Moreover, after taking the boat away from the plaintiff and placing her in his own charge, did not the defendant abandon her; did he not permit her to sink; did he not allow her to stay on the bottom of the river and rot, although she could have been raised the next day for \$150.00 (R. 6); and has he not, by reason of such dereliction of duty, thereby kept plaintiff out of the possession and use of his own property for over six long years? Has he not likewise prevented the plaintiff from recovering less than one-half of what his boat was actually worth; and has he not, although verdict in this case was obtained June 3, 1912, kept plaintiff in one way or another from getting confirmation thereof until the present time?

Although a distinction is sought to be made as to the principles of law applicable to the different state of facts

set out in the III and V instructions asked for by the defendant; upon analysis it is found to be like unto that between tweedle-dum and tweedle-dee.

The gist of each is that because plaintiff knew and consented to the wrong being done him, no recovery could be had.

Moreover these instructions assume that the plaintiff had control over his libeled boat. A boat in the custody of the law. A boat that had been taken from him. A boat that he had nothing at all to do with. A boat that he had not even seen for over a month.

So, whether by cross-libel plaintiff became any more of an actor in the libel proceedings than when personally impleaded at the behest of another; or whether by merely seeking to enforce a personal claim—not against his own libeled property or against what was his own—only against the individual liability of the libelants themselves, he increased his *actor* proclivities to the extent of twenty-five or even fifty per centum, such scarcely concerns the question: for no particular position in these self-same libel proceedings could enjoin a varying intensity of “consent” to his own wrong.

The sole question, after all, in the case upon this record, is whether the plaintiff, having control over his boat, knew she was sinking, or about to sink, and permitted this to happen for purposes of his own gain.

The testimony not only fails to affirmatively show such, but distinctly negatives any such supposition.

Accordingly it is asked that the judgment below be affirmed.

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